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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/684,668	10/14/2003	Steve Mitchell	KLYCD-05008US1	3396
7590	08/18/2004		EXAMINER	
Sheldon R. Meyer FLIESLER DUBB MEYER & LOVEJOY LLP Fourth Floor Four Embarcadero Center San Francisco, CA 94111-4156			SNOW, BRUCE EDWARD	
			ART UNIT	PAPER NUMBER
			3738	
			DATE MAILED: 08/18/2004	

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/684,668	MITCHELL, STEVE <i>CH</i>
	<b>Examiner</b>	<b>Art Unit</b>
	Bruce E Snow	3738

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 02 August 2004.

2a) This action is **FINAL**.                                   2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 1-36 is/are pending in the application.

4a) Of the above claim(s) 24 and 25 is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-23 and 26-36 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 3/19/04

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_

**DETAILED ACTION**

***Election/Restrictions***

Applicant's election without traverse of Group I in the reply filed on 8/02/04 is acknowledged. Claims 24-25 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention.

It is noted that applicant failed to respond to the election of species requirement; this requirement has been withdrawn to order to expedite prosecution.

***Claim Rejections - 35 USC § 112***

Claims 16-20 and 22-23 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 16-20, the configurations described appear to conflict each other. Please direct to the specification and drawings for support. Diagrams would be helpful.

Regarding claims 22-23 directly conflict each other. Please direct to the specification and drawings for support. Diagrams would be helpful.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Discussion: the definition of the claim terminology "crossbar" is defined as:

**cross·bar** (krôs' bär', krôs' -) *noun*  
A horizontal bar, line, or stripe.<sup>1</sup>

Claims 1, 4-12, 14, 21-23, 35-36 are rejected under 35 U.S.C. 102(e) as being anticipated by Ferree (2004/0106998).

**Note that the provisional application No. 60/416,181 was filed on October 4, 2002 and supports figures 1-6 only.** Ferree teaches an implant comprising a first

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<sup>1</sup>*The American Heritage® Dictionary of the English Language, Third Edition* copyright © 1992 by Houghton Mifflin Company. Electronic version licensed from INSO Corporation; further reproduction

piece 104 having a first socket a second piece 104' having a second socket and a crossbar member 102 that is at least partially received in the first socket and the second socket.

The crossbar member includes first and second bars configured perpendicular forming a "T" or "+" shape.

Regarding claim 5, the socket or interior surfaces comprise many different slopes.

Claims 1-23 and 26-36 are rejected under 35 U.S.C. 102(e) as being anticipated by Wagner et al (6,706,070).

Applicant must consider all configurations taught by Wager, a couple configurations are specifically discussed. Referring to figures 8-9, Wagner et al teaches an implant comprising a first piece 12 having a first socket 60, a second piece 14 having a second socket 60 and a crossbar member 30 that is at least partially received in the first socket and the second socket.

Regarding claim 2 having first and second bars that are perpendicular, see figure 6B showing element 30 having generally "I" shape having upper and lower bars separated by a middle bar. **Also see figures 42-49 which comprise elements which are self-evident. See the embodiments shown in figure 38 wherein the bars abut.**

Claims 3 and 26, inherently the "I" shape has a bar above the middle bar. Also, referring to figure 9, another interpretation the first bar 30 is mounted higher or above second bar 32.

Regarding claim 12, see at least figure 42.

Regarding at least claims 15-20 claiming a keel, see at least elements 516, 616, 716, 816, 916, 1016.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 15-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ferree (2004/0106998) in view of Marnay (WO 01/01893).

Ferree teaches the implant as described above, however, fails to teach a keel. Marnay teaches the keel configuration as claimed. It would have been obvious to one having ordinary skill in the art to have used the keel/s of Marnay on the implant of Ferree to better anchor it to the vertebrae.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bruce E Snow whose telephone number is (703) 308-3255. The examiner can normally be reached on Mon-Thurs.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on (703)308-2111. The fax phone

number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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BRUCE SNOW  
PRIMARY EXAMINER